IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 13.02.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

S.A.No.620 of 1997

Selvaraju .. Appellant/Defendant

vs.

N.Pandian .. Respondent/Plaintiff

Prayer: This second appeal has been preferred u/s 100 CPC against the decree and judgment dated 23.7.1996 passed by the Additional Subordinate Judge, Cuddalore, made in A.S.No.168/1994, preferred against the decree and judgment dated 20.07.1994,made in O.S.No.121/1993 on the file of the Court of Principal District Munsif, Cuddalore.

For Appellant : Mr.S.Venkateswaran
For Respondent : Mr.R.Yashodvardhan

JUDGMENT

This appeal has been preferred against the decree and judgment in A.S.No.168 of 1994 on the file of the Court of Subordinate Judge, Cuddalore. The defendant in O.S.No.121/1993 on the file of the Court of District Munsif, Cuddalore, is the appellant herein.

2. The short facts in the plaint relevant for the purpose of deciding this appeal are as follows:-

2(a) The suit property are situated at Vellakarai Village. The suit property belonged to S.Thandavarayan, S/o Subbarayan of Vellakarai Colony, since he purchased the said properties by means of a registered sale deed dated 10.09.1968 for Rs.800/- from one Tangavel S/o.Nachi. The said Thandavarayan was in possession and enjoyment of the properties till his death and after his death his wife Visalakshi and his sons Jayamurthy and Santhamurthy have succeeded the estate under Hindu Succession Act, and they have been in possession and enjoyment of the properties by paying kist under patta No.1754, while Thandavarayan was alive. After re-survey UDR patta was also given to him.

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2(b) The plaintiff herein has entered into an agreement with Visalakshi and his sons to purchase the properties on 30.12.1992, and in pursuance of the abovesaid agreement dated 30.12.1992, the plaintiff has purchased the property by means of a registered sale deed dted 8.2.1993, for Rs.33,000/- from Visalakshi and his sons. In pursuance of the above said deed the plaintiff has been inducted into possession of the properties and he has been cultivating the same. The plaintiff has also paid kist to the suit properties. The plaintiff has raised Cashew crops upon the suit properties.

2(c) The defendant is an utter stranger to the suit property, and he also took steps to purchase the properties from Visalakshmi Ammal. Visalakshmi Ammal preferred the plaintiff than the defendant to sell the same. Aggrieved by this, the defendant has attempted to trespass into the suit properties on 13.2.1992 and it was successfully prevented by the plaintiff. Hence, the suit for injunction.

3. The defendant has filed a written statement contending that the suit property is a joint family property of Thangavellu and Chinapaiyan, sons of Nachi. Hence, Thangavellu and Chinapaiyan are each entitled to ½ share each in the suit property. On 13.12.1962 both Thangavelu and Chinapaiyan had executed a sale deed in respect of the suit item No.2 property in respect of 66 cents in favour of one Ammavasai. On 14.08.1963 Chinnapaiyan had executed a sale deed in respect of 33 cents in respect of plaint item No.2 property in favour of Chinnakannu. On 15.6.1977, the plaintiff had purchased 33 cents from Chinnakannu. On 10.9.1968 Thagavelu had executed sale deed for 49 ½ cents on the eastern portion of item No.2 and in respect of the entire first Item infavour of Thandavarayan. The above said sale deed is not valid one because Chinnapaiyan was entitled to one half share in the suit item No.1 property. Under the above said sale deed Thangavelu had no right to execute a sale deed in respect of 1.12 cents. The above said sale deed will not bind Chinnapaiyan. Thangavelu and Chinnapaiyan have orally partitioned their property a few years back. Under the partition half share was allotted in plaint item NO.1. Chinnapaiyan was allotted 60 ½ cents on the south and the same was in possession and enjoyment of Chinnapaiyan and he was paying land tax to the properties fell into his share. The southern 60 ½ cents on the south was purchased by the defendant after the death of Chinnapaiyan from his sons Murugan and Arumugam. Hence, the defendant is entitled to southern 60 ½ cents in the plaint first schedule property. The plaintiff is not in possession of the paint schedule property. The defendant and his predecessors in title were in possession and enjoyment of 60 ½ cents on the southern portion of plaint schedule item No.1 property for more than 20 years. Hence, the defendant has prescribed title by way of adverse possession to the plaint schedule item No.1 property. Hence, the suit is liable to be dismissed.

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4. The plaintiff has filed a reply statement denying the averments in the written statement. The defendant has filed an additional written statement denying the averments in the reply statement filed by the plaintiff

5. On the above pleadings the learned trial Judge has framed four issues for trial. On the side of the plaintiff P.W.1 and P.W.2 were examined and Ex.A.1 to A.10 were marked. D.W.1 and D.W.2 were examined on the side of the defendant and Ex.B.1 to B.3 were marked. After going through the oral and documentary evidence, the learned trial Judge has come to the conclusion that the plaintiff is entitled to the relief as prayed for in the plaint and consequently decreed the suit as prayed for with costs. Aggrieved by the findings of the learned trial Judge, the defendant preferred an appeal in A.S.No.168/1994 before the learned subordinate judge, Cuddalore. The first appellate Court has also in agreement with the findings of the learned trial judge, has confirmed the decree and judgment of the trial Court thereby dismissing the first appeal. Hence, the second appeal by the defendant before this court.

6. The substantial questions of law involved in this second appeal are as follows:-

"a) Whether in law the Courts below are right in shifting the onus on the defendant to disprove the plaintiff's case?

b) Whether in law the Courts below are right in ignoring the recitals in Ex.B.2 which conclusively prove that the properties were jointly enjoyed by the parties?

7.The Point:-

7(a) Ex.A.1 is the sale deed dated 10.9.1968 executed by one Thangavellu in favour of Thandavarayan in respect of S.No.886/11 to an extent of one half of eastern 49 ½ cents out of 99 cents. The legal representatives of the vendee under Ex.A.1 viz. Thandavarayan had entered into an agreement of sale under Ex.A.2 dated 30.12.1992 in favour of plaintiff Pandian. Ex.A.2 agreement of sale is in respect of two properties out of them the second item to the schedule to Ex.A.2 is S.No.886/11 to an extent of eastern 49 ½ cents out of 99 cents, purchased by Thandavarayan under Ex.A.1. Ex.A.3 is the sale deed executed by the wife and children of Thandavarayan in lieu of the sale agreement entered into between them and the plaintiff under Ex.A.2. Eastern 49 ½ cents out of 99 cents in S.No.886/11 was sold in favour of the plaintiff by the legal representatives of Thandavarayan under Ex.A.3. Ex.A.5 is the tax receipt in favour of the plaintiff. There are two items scheduled to the plaint. Item No.1 is new S.No.358/2A, measuring 0.69.9 ares out of 7.35.0 ares (old S.No.886/12 measuring 1 acres 21 cents). Under Ex.A.1 Thangavelu had executed sale deed in respect of S.No.886/12 measuring 1 acres 21 cents and also in respect of S.No.886/11 measuring 49 ½ cents. So Ex.A.1 is in respect of both items of the plaint schedule properties. Both the courts below have correctly held that under Ex.A.3 the plaintiff

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is entitled to the declaration of his title and possession in respect of the plaint schedule properties.

7(b) The contention of the learned counsel appearing for the appellant is that the suit property belongs to Thangavellu and his brother Chinnapaiyan and that is why only half share in item No.2 to an extent of 49 ½ cents out of 99 cents was sold by Thangavellu in respect of item No.2. But in respect of item No.1 Thangavelu is not entitled to sell the entire 1 acres 21 cents in old S.No.886/12. But Thangavelu had executed Ex.A.1-sale deed in the year 1968 at the time his brother Chinnapaiyan was alive. Thandavarayan's wife was examined as P.W.1. In the cross-examination she would depose that as far as the first item to the plaint schedule property is concerned both Thangavelu and Chinnapaiyan have orally partitioned and as per the oral partition Thangavelu got the northern portion and Chinapaiyan got the southern portion. So, according to her, even before Ex.A.1-sale deed there was a partition between Chinnapaiyan and Thangavellu and only in the partition item Nos.1 & 2 were allotted to the share of Thangavelu.

7(c) The defendant who was examined as D.W.1 in the cross-examination has admitted that he has no dispute with regard to item No.2 to the plaint schedule property. He has deposed to the fact that there is no document to show that item No.1 belongs to the father of Thangavelu and Chinnapaiyan viz. Nachi. He would admit that there was a partition between Thangavelu and Chinnapaiyan. He would further admit that Chinnapaiyan's wife is still alive, but Chinnapaiyan is now no more. Till the death of Chinnapaiyan, Chinnapaiyan has not objected to for the execution of Ex.A.1-sale deed by Thangavelu in respect of plaint item No.1 & 2 properties in favour of Thandavarayan. If Chinnapaiyan had half share in item No.1 then he would have field a suit to set aside Ex.A.1-sale deed in rspect of his one half share. According to D.W.2, Chinnapaiyan died some seven or eight years prior to 1994 (year of deposition of D.W.2). So, Chinnapaiyan should have died in or around 1986. But Ex.A.1 was executed in 1968, at the time when Chinnapaiyan was alive and he died nearly 18 years after the execution of Ex.A.1. But he has not raised any objection to the execution of Ex.A.1-sale deed. Under such circumstances, I do not find any illegality or infirmity in the findings of the learned first appellate Court in A.S.No.168/1994 on the file of the Court of Subordinate Judge, Cuddalore, which is neither illegal nor infirm to warrant any interference from this Court. Points are answered accordingly.

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8. In fine, the second appeal is dismissed confirming the decree and judgment in A.S.No.168/1994 on the file of the Court of Subordinate Judge,Cuddalore, with costs.

ssv

Sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

To,
1.The Addl. Subordinate Judge, Cuddalore.

2.The Prl. District Munsif, Cuddalore.

3.The Record Keeper, VR Section,
High Court,Madras.

+1 cc to Mrs.Hema Sampath, Advocate Sr.No.9103.

+1 cc to Mr.R.Yashod Vardhan, Advocate Sr.No.9144.

JRG(CO)
dcp/4.4.07

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